

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re E. F. et al., a Person Coming Under
the Juvenile Court Law.

LAKE COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

ANNELLE F.,

Defendant and Appellant.

A110479

(Lake County Super.
Ct. No. JV320024)

Annelle F. appeals from the orders terminating her parental rights as to A. F., age 6, J. S., age 3, and D. F., age 2, and approving the permanent plan of adoption for her two oldest children, E. F., age 11, and D. H., age 10. She contends that: (1) The trial court failed to comply with the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901) (ICWA); (2) her children were not adoptable because they were a bonded sibling group; (3) the court abused its discretion by failing to apply the sibling bond exception of Welfare and Institutions Code¹ section 366.26, subdivision (c)(1)(E); (4) the evidence was insufficient to support the courts finding of adoptability; and (5) the trial court erred in not appointing separate counsel for each of the children. We affirm.

¹ All further statutory references are to the Welfare and Institutions Code.

I. FACTUAL BACKGROUND

On May 4, 2004, the Lake County Department of Social Services (the Department) filed a section 300 petition alleging that mother had an untreated substance abuse problem, that she tested positive for methamphetamine and benzodiazines at the time of D. F.'s birth, that she left her four older children in the home of an inappropriate caregiver for extended periods of time and without adequate resources, and that her whereabouts and those of D. F. were unknown. A detention hearing was held on May 5, 2004. The court ordered the mother to reveal the whereabouts of D. F. and issued a protective custody warrant for him. The court ordered that mother's four older children be placed in out-of-home placement.

An uncontested jurisdictional hearing was held on June 7, 2004. The court sustained the allegations of the petition and continued the placement of the children in foster care. On June 28, 2004, mother's cousin and his girlfriend filed a request for de facto parent status. The court granted the request on July 19, 2004. The disposition hearing was held on September 27, 2004. The court declared the children dependents of the court, ordered reunification services, and set the six-month review hearing for December 6, 2004.²

The Department's report for the six-month review hearing indicated that E. F. and D. H., mother's older children, were residing with the de facto parents, while her younger children were in foster home placements. The mother's whereabouts were unknown. Mother had failed to avail herself of reunification services. She visited the children three times but had not visited them since August 4, 2004. The Department recommended that reunification services be terminated.

The six-month review hearing was held on December 13, 2004. The court adopted the Department's recommendations and terminated reunification services. The court set a section 366.26 hearing for April 4, 2005.

² The court also ordered reunification services for the presumed father of the younger children. He is not a party to this appeal. The father of D. H. signed a "Consent of Proposed Guardian" nominating the de facto parents as legal guardians. The father of E. F. is unknown.

The Department's report for the section 366.26 hearing stated that E. F. and D. H., mother's two oldest children, were residing with the de facto parents while the three youngest children were in a foster-adopt home. The Department reported that it was notified on March 10, 2005, that the children's grandmother was of Indian heritage. The Department therefore notified the Bureau of Indian Affairs of the pending proceedings and requested confirmation of the children's eligibility under the ICWA. The Department recommended that adoption be identified as the permanent plan for E. F. and D. H., and that the section 366.26 hearing for them be continued to permit time to process the adoption application filed by the de facto parents. It further recommended that mother's parental rights be terminated as to her youngest children and that they be placed for adoption.

The section 366.26 hearing commenced on April 4, 2005. The court continued the hearing twice to allow the de facto parents and mother time to investigate the children's possible Indian heritage. The de facto parents were opposed to the Department's recommendation of adoption for the younger children and raised the ICWA issue to forestall that adoption. The Department subsequently notified the Lumbee Tribe and Oklahoma Cherokee Tribe to determine whether the children had ICWA eligibility. The United Lumbee Nation responded, indicating that the children's great-grandmother was a member of the tribe, and that it had informed her of the dependency proceedings and asked her to contact the Department with information concerning a relative able to help with the children. The Cherokee Nation of Oklahoma also responded to the Department's notice. The Cherokee Nation advised that the children were eligible for enrollment and affiliation with the Cherokee Nation based on their direct lineage to their maternal great-great-grandmother. It, however, noted that it was not empowered to intervene in the matter unless the children or an eligible parent applied and received membership.

On June, 6, 2005, the court denied counsel for the children's request for a continuation of the hearing to enroll the children in the Cherokee Nation tribe. It found that notice had been given to the tribes as required by law. The court thereafter

concluded the section 366.26 hearing, terminating the mother's parental rights as to her three youngest children, finding that they were likely to be adopted. The court ordered adoption as the permanent plan for the two older children.

II. DISCUSSION

A. ICWA Compliance

Mother first contends that the section 366.26 orders are invalid because the Department failed to notify two of the three Cherokee tribes. The Department urges that mother waived the ICWA requirements.

The ICWA provides the following notice requirements pertaining to dependent children who may belong to Indian tribes: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian *and the Indian child's tribe*, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. . . . No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe" (25 U.S.C. § 1912(a), italics added.)

Here, the record shows that at the beginning of the section 366.26 hearing, the de facto parents requested a continuance of the hearing to investigate the children's possible tribal affiliations based on the maternal grandmother's Indian heritage. The maternal grandmother testified that she believed she was eligible to register for a tribe but did not have any information about tribal membership. She had never been affiliated with a tribe and had never participated in any particular Indian traditions. The court continued the hearing to allow the de facto parents time to investigate the children's tribal affiliations. Counsel for mother took the position that the de facto parents did not have standing to raise the ICWA issue and submitted the section 366.26 issues on the Department's report.

At the continued section 366.26 hearing, the maternal grandmother testified that her mother was a Lumbee Indian from the Lumbee Nation and that her grandfather's grandmother was registered with the Cherokee Nation. The Department requested a two-

month continuance to allow it time to give notice to the two tribes and permit them to intervene, and to determine whether mother and her children were eligible for membership. The court ordered mother to make active efforts to pursue whatever tribal memberships were available for her children and to perfect them.

The Department thereafter notified the Lumbee Tribe and the Cherokee Nation of Oklahoma. The tribes confirmed that the children had tribal eligibility. The United Lumbee Nation forwarded information about the dependency proceedings to the great-grandmother, while the Cherokee Nation indicated that the children were eligible for membership but that it was not empowered to intervene in the proceedings unless the children or parents applied and received membership. On the date set for the conclusion of the section 366.26 hearing, counsel for the children requested a continuance of the hearing to permit the children to be enrolled as members in the Cherokee Nation. The court denied the motion.

Mother argues that the Department failed to comply with the notice provisions of the ICWA because it did not notify two additional Cherokee Tribes of the proceedings. This argument is without merit.

Following the hearing in which the children's possible tribal affiliations were identified, the Department promptly sent notice to those entities. There is nothing in the record to support notice to the two other Cherokee tribes, the Eastern Band of Cherokee Indians of North Carolina and the United Keetoowah Band of Cherokee Indians of Oklahoma, which mother has now identified. There is simply no evidence that the children might be eligible for membership in either of these tribes.

Mother also contends that the Department's ICWA expert witness, who testified at the section 366.26 hearing, was not a qualified expert witness under the ICWA. The Department asserts that mother waived the issue because she failed to object below. A parent's failure to object, however, does not waive the ICWA standards of proof and requirements for expert testimony unless the record demonstrates that the parent knowingly, intelligently, and voluntarily waived those requirements. (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1160; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 707.)

Here, while mother failed to object to the testimony of the Department's ICWA expert witness, there is no indication that she waived the ICWA requirements. The record, nonetheless, demonstrates that the Department's ICWA expert witness complied with ICWA requirements. (Cal. Rules of Court, rule 1439(i).) Toni Jones, a senior adoption specialist with the Department with approximately 20 years experience in the child welfare field, had previously qualified as an ICWA expert, had attended trainings in ICWA, and had numerous cases with Indian children both as an adoption worker and as a child protective services worker. She testified that it would be seriously detrimental for the three younger children to be returned to their parents. She opined that it was likely that the children would retain their eligibility to become members in the Cherokee Nation even if they were adopted.

Jones's testimony satisfied the ICWA requirements. A qualified expert witness is defined under the ICWA as "a person qualified to address the issue of whether continued custody by a parent or Indian custodian is likely to result in serious physical or emotional damage to the child. Persons most likely to be considered such an expert are: [¶] (A) a member of a tribe with knowledge of Indian family organization and child rearing; or [¶] (B) a lay expert with substantial experience in Indian child and family services and extensive knowledge of the social and cultural standards and child-rearing practices of Indian tribes, specifically the child's tribe, if possible; or [¶] (C) a professional person with substantial education and experience in Indian child and family services and in the social and cultural standards of Indian tribes, specifically the child's tribe, if possible; or [¶] (D) a professional person having substantial education and experience in the area of his or her specialty." (Cal. Rules of Court, rule 1439(a)(10).) Here, Jones qualified as an expert under rule 1439(a)(10)(D). Not only was she a professional in child welfare services, but she also had specific training in the ICWA and worked with numerous Indian children. Her testimony concerning the dispositive issue of whether mother's continued custody of the children was likely to result in serious emotional or physical damage to the children here was also supported by the record. Mother submitted the section 366.26 issues on the Department's report, and offered no argument against the

Department's recommendations. Moreover, the record shows that she failed to participate in reunification services, had not visited with the children since August 2004, and had not addressed her substance abuse problems. On this record, we conclude that the court complied with the ICWA requirements.

B. Sibling Relationship

Mother next argues that there is a presumption that a child is not adoptable if bonded to a sibling who is not adoptable and the siblings would benefit from continued contact. As the Department points out, there is no statutory or case authority for that presumption. Moreover, mother failed to raise the issue below. Although mother waived the issue by failing to object to the adoptability finding below, we consider the issue “ ‘if only to demonstrate that trial counsel was not ineffective for failing to argue the issue.’ ” (*In re Brian P.* (2002) 99 Cal.App.4th 616, 622.)

The Legislature has specifically addressed sibling relationships in the statutory provision setting forth the circumstances under which termination of parental rights would be detrimental to the child. Section 366.26, subdivision (c)(1)(E) provides the following exception to termination of parental rights: “There would be substantial interference with a child’s sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child’s best interest, including the child’s long-term emotional interest, as compared to the benefit of legal permanence through adoption.” (See *In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947-948.)

Under section 366.26, subdivision (c)(1)(E), the court must first determine whether termination of parental rights would substantially interfere with the sibling relationship; and if so, the court must then weigh the child’s best interest in continuing that relationship against the benefit of adoption. (*In re L. Y. L.*, *supra*, 101 Cal.App.4th at pp. 951-952.) The parent bears the burden of showing the existence of a significant

sibling relationship, the severance of which would be detrimental to the child. (*Id.* at p. 952.)

Here, the Department's report for the section 366.26 hearing included the adoption assessments of the children. The assessments acknowledge a relationship among the children and conclude that it would be in the best interests of the children to have ongoing contact. They further indicate that the prospective adoptive parents of the younger children understand the importance of sibling relationships and are committed to the children's having contact with their siblings. The assessments noted that a sibling visit was scheduled and the Department's report recommended ongoing sibling contact. At the section 366.26 hearing, the prospective adoptive father of the younger siblings stated that he would continue sibling visits if they were in the best interests of the children. The issue was not otherwise raised at the hearing.

While the record indicates that the children would like to maintain contact with each other, it does not support applying the statutory exception to the rule that the court must terminate parental rights and choose adoption when reunification efforts have failed. (See *In re Celine R.* (2003) 31 Cal.4th 45, 53.) “ ‘Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.’ ” (*Id.* at p. 52, quoting *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) “[T]he sibling relationship exception permits the trial court to consider possible detriment to the child being considered for adoption, but not a sibling of that child. . . . Nothing in [section 366.26, subdivision (c)(1)(E)] suggests the Legislature intended to permit a court to not choose an adoption that is in the adoptive child's best interest because of the possible effect the adoption may have on a sibling.” (*In re Celine R., supra*, 31 Cal.4th at p. 54.) Mother had the burden of showing a strong sibling relationship among her children and a detriment to the younger children being considered for adoption. (*In re Jacob S.* (2002) 104 Cal.App.4th 1011, 1017.) She failed to show that adoption would be detrimental to her younger children because there would be a substantial interference with their sibling relationships. To the contrary, the record demonstrated that although the children knew each other, and that continued sibling visitation was recommended, the benefits of the

permanence of adoption for the younger siblings far outweighed any interference with their sibling relationships that might occur.

C. Adoptability Finding

Mother alternatively contends that there is insufficient evidence to support the court's finding that the younger children were adoptable.

In assessing a claim of insufficiency of the evidence, we review the record in the light most favorable to the juvenile court's findings, and we draw all inferences from the evidence that support the court's determination. (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1177.) “ ‘The issue of adoptability posed in a section 366.26 hearing focuses on the minor, e.g., whether the minor's age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor. [Citations.]’ ” (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154, quoting *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.)

Here, substantial evidence supports the juvenile court's finding that the children were likely to be adopted. The adoption assessment states that the younger children had resided together with the prospective adoptive parents since December 15, 2004. The prospective adoptive parents had an approved adoption home study on file with the State Department of Social Services and had committed to adopting the children. The fact that prospective adoptive parents expressed interest in adopting the children constituted evidence that they were likely to be adopted. (*In re Lukas B.*, *supra*, 79 Cal.App.4th at p. 1154; *In re Sarah M.*, *supra*, 22 Cal.App.4th at pp. 1649-1650.) “In other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family.*” (*In re Sarah M.*, *supra*, 22 Cal.App.4th, at p. 1650.) While mother finds fault with some aspects of the adoption assessment, she waived the issue of the inadequacy of the adoption assessment report on appeal because she failed to argue the issue in the trial court. (*In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1559-1561; *In re Brian P.*, *supra*, 99 Cal.App.4th at pp. 622-623.) In any event, the adoption assessment substantially complied with statutory requirements. (See § 366.22, subd. (b).)

D. Separate Counsel for Separate Siblings

Finally, mother contends that the children should not have been represented by the same counsel because a conflict arose necessitating the need for separate counsel for the younger children. She argues that the placement of the younger children in a prospective adoptive home was not in their best interests and that they should have been placed in the home of the de facto parents with the older siblings.³

In *In re Celine R.*, *supra*, 31 Cal.4th at page 50, our Supreme Court held that in dependency cases, “the court may appoint a single attorney to represent all of the siblings unless, at the time of appointment, an actual conflict of interest exists among them or it appears from circumstances specific to the case that it is reasonably likely an actual conflict will arise.” Here, the record fails to support mother’s argument that an actual conflict of interest arose. Counsel for the children did not contest the Department’s recommendation concerning placement and the adoption assessment indicates that the younger children were significantly attached to their prospective adoptive parents. And, at no point did anyone request separate counsel for the children. (Cf. *id.* at pp. 50-51 [counsel for three children asked to withdraw as counsel for two siblings and represent only the half sister due to conflict].) There was simply no basis for the court to appoint separate counsel for the children.

³ Mother ignores the evidence in the record that the Department considered the de facto parents for placement of all the children in August 2004 and determined that such a placement was not in the children’s best interests.

III. DISPOSITION

The orders are affirmed.

RIVERA, J.

We concur:

REARDON, Acting P. J.

SEPULVEDA, J.